STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAMELA McNAMARA,

Defendant-Appellant.

UNPUBLISHED
February 8, 2000

No. 214644
Lake Circuit Court
LC No. 95-3079-1-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY McNAMARA,

Defendant-Appellant.

No. 214664
Lake Circuit Court
LC No. 95-3080-1-FH

Before: Smolenski, P.J., and Griffin and Neff, JJ.

PER CURIAM.

In this consolidated case, defendants Gary McNamara (sometimes referred to as "Gary") and Pamela McNamara (sometimes referred to as "Pam") appeal as of right from their convictions arising from the detention of a process server, Steven Wowianko, at defendants' residence contrary to MCL 750.479; MSA 28.747 and defendant Gary McNamara's obstruction and resistance of officers from the Lake County Sheriff's Department who responded to the process server's call for help contrary to MCL 750.479; MSA 28.747. We affirm.

In their first issue on appeal, defendants contend that the prosecution's conduct during trial was so highly prejudicial that it denied them a fair trial. We disagree. In reviewing alleged prosecutorial

misconduct, this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *Id.* Where counsel fails to timely object to the alleged prosecutorial misconduct, appellate relief is precluded unless an instruction could not have cured the prejudicial effect or if the failure to consider the issue would result in a miscarriage of justice. *People v Wells*, __ Mich App __; __ NW2d __ (Docket No. 202891, released 11/2/99), slip op p 3.

First, defendants contend that the special prosecutor attacked defendant Pam McNamara's credibility with the previous statements of the Lake County prosecutor Michael Riley, regarding how defendants should respond to trespassers, even though Riley did not appear at trial.[1] Second, defendants contend that the special prosecutor misrepresented the testimony of the previous Lake County process server, Joseph Kuhlman, regarding defendant Pam McNamara's attempt to influence Kuhlman's testimony before the trial. Defendants' counsel objected to the statement and the trial court apparently sustained the objection, because the judge instructed the jurors to rely on their memory "whether that was or wasn't presented as part of the questioning of that witness [i.e., Kuhlman]."

Third, defendants contend that the prosecutor mischaracterized Wowianko's testimony that defendant Pam McNamara carefully looked at the papers. Fourth, defendants contend that the prosecutor disparaged their defense, i.e., that defendants did not know Wowianko was a process server, by reference to fictional evidence that defendants were trying to evade service from a lawsuit involving the payoff of a land contract and that defendant Pam McNamara knew the papers brought by Wowianko were legal papers. Fifth, defendants contend that the special prosecutor's closing argument "denigrated the defense and defense counsel," by referring to the defense as "big lies" and "red herrings." Sixth, defendant points to the fact that the trial court sustained defense counsel's objection to the special prosecutor's statement that defense counsel is "not in here for a search for truth," and that defense counsel "doesn't want the truth, because the truth convicts his clients."

In reviewing defendants' contentions, we note that defendant only objected to two instances of alleged misconduct, i.e., the comments regarding Kuhlman's testimony and the comment regarding defense counsel's failure to search for the truth. After examining the pertinent portion of the record and evaluating these two remarks in context, we cannot conclude that defendants were denied a fair and impartial trial. The trial court issued a curative instruction reminding the jury to consider Kuhlman's actual testimony. Furthermore, the special prosecutor's comments regarding defense counsel's failure to search for the truth did not amount to the denigration of defense counsel requiring reversal. While a prosecutor may not question a defense counsel's veracity, *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984), a prosecutor can point out the deficiencies in a defendant's case. The following quote from *People v Howard*, 226 Mich App 528, 544-545; 575 NW2d 16 (1997) applies here:

> Viewed in context, the prosecutor did not argue that defense counsel lied or was trying to intentionally mislead the jury concerning the facts. Rather, the prosecutor was merely advancing his position that the defense theory was dependent upon testimony that did not comport with other evidence at trial and, for that reason, should be rejected.

Because defendants did not object to any other remarks, we should not grant relief unless an instruction could not have cured the prejudicial effect or if the failure to consider the issue would result in a miscarriage of justice. *Wells, supra*, slip op at 3. Here, we conclude that an instruction from the trial court could have cured any prejudicial effect caused by the other remarks. The trial court's final instructions indicating that counsel's statements were not evidence was itself a general curative instruction. See *People v Pegenau*, 447 Mich 278, 298-300; 523 NW2d 325 (1994) (Mallet, J). We further conclude that the remarks did not result in a miscarriage of justice. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

In their next issue on appeal, defendants contend that they were precluded from having the jury consider their defense that they had a right to resist and oppose the process server on the ground that he was a trespasser. Specifically, defendants contend that the trial court erred in failing to give an instruction to the jury that defendants had the right to resist Wowianko if they believed that he was forcibly entering their home. We disagree. This Court reviews de novo claims of instructional error. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). "This Court reviews jury instructions as a whole to determine whether there is error requiring reversal." *Id.* Jury instructions in a criminal case must include all the elements of the charged offense and must not omit material issues, defenses and theories if the evidence supports them. *Id.* "Even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect the defendant's rights." *Id.* at 143-144. In reviewing a claim that the jury was improperly instructed, this Court will not reverse a verdict or order a new trial unless, after reviewing the record, it appears to this Court that the error resulted in a miscarriage of justice. *Id.* at 144; MCL 769.26; MSA 28.1096.

MCL 750.479; MSA 28.747 prohibits resisting and obstructing officers and process servers:

> Any person who shall knowingly and wilfully obstruct, resist or oppose any sheriff, coroner, township treasurer, constable or other officer or person duly authorized, in serving, or attempting to serve or execute any process, rule or order made or issued by lawful authority, or who shall resist any officer in the execution of any ordinance, by law, or any rule, order or resolution made, issued, or passed by the common council of any city board of trustees, or common council or village council of any incorporated village, or township board of any township or who shall assault, beat or wound any sheriff, coroner, township treasurer, constable or other officer duly authorized, while serving, or attempting to serve or execute any such process, rule or order, or for having served, or attempted to serve or execute the same, or who shall so obstruct, resist, oppose, assault, beat or wound any of the above named officers, or any other person or persons authorized by law to maintain and preserve the peace, in their lawful acts, attempts and efforts to maintain, preserve and keep the peace, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than 2 years, or by a fine of not more than 1,000 dollars.

Here, the trial court instructed the jury in conformance with CJI2d 13.3 as follows:

> Regarding [defendant] Pamela McNamara, she is charged with the crime of resisting or obstructing or opposing an officer who is serving legal papers.
>
> To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the defendant resisted or obstructed or opposed an officer serving civil process. The defendant must have actually resisted or obstructed or opposed by what she said or did, but physical violence is not necessary.
>
> Second, that the person the defendant resisted, opposed, or obstructed was an authorized person to serve civil process.
>
> Third, that the defendant knew then that the person was a process server.
>
> Fourth, that the officer was then serving or trying to serve legal papers.
>
> Fifth, that the defendant knew that the officer was doing so.
>
> Sixth, that the defendant intended to resist or oppose or obstruct the process server.
>
> The law does not specify what means a process server may use to serve process, except that a process server may not use force.

The trial court gave nearly identical instructions in regard to defendant Gary McNamara's count of resisting an officer serving legal papers. Defendants admit in their brief that defense counsel did not object to the instruction as given. Therefore, review is foreclosed absent manifest injustice. *People v Kuchar*, 225 Mich App 74, 78; 569 NW2d 920 (1997). Here, we find that manifest injustice did not result from the trial court's instructions because the jury could have considered defendants' "fear of a dangerous trespasser" defense under the third and fifth elements and the additional instruction that the process server "may not use force."

In their next issue on appeal, defendants contend that the evidence presented at trial was insufficient to sustain the verdict and that a directed verdict of acquittal should have been entered. While defendants' question addresses the trial court's alleged error in failing to grant their motion for a directed verdict, defendants combine two issues in a single argument, claiming that the trial court improperly denied their motion for a directed verdict and that there was insufficient evidence to support the convictions. Defendants raise four sub-issues related to these claims.

In their first sub-issue, defendants contend that the evidence was insufficient to sustain a verdict against defendant Gary McNamara for resisting the process server because the prosecution presented no evidence to allow the inference that he knew Wowianko was a process server at the time he blocked the driveway. We disagree. In reviewing whether a trial court abused its discretion in denying defendant's motion for a directed verdict, "this Court views the evidence presented by the prosecutor

up to the time the motion was made in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime were proved beyond a reasonable doubt." *People v Crawford*, 232 Mich App 608, 615-616; 591 NW2d 669 (1998). Here, Wowianko testified that he was wearing an identification badge, that he identified himself as a process server, that defendant Pam McNamara looked at the papers, yelled to defendant Gary McNamara that "the man is here" and later placed the papers under the windshield wiper blades of Wowianko's car. Wowianko also testified that defendant Gary McNamara rocked the car and ordered him out. In addition, Lake County Sheriff Robert Hilts testified that he told defendants that Wowianko was a process server. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could determine that defendant Gary McNamara knew beyond a reasonable doubt that Wowianko was a process server.

In their second sub-issue, defendants contend that the evidence was insufficient to establish that defendant Gary McNamara engaged in conduct that constituted resisting, opposing or obstructing a police officer. We disagree. In reviewing a claim of insufficient evidence, this Court reviews the evidence in the manner most favorable to the prosecution to determine whether it was sufficient for a rational trier of fact to find that the essential elements of the charged crime were proven beyond a reasonable doubt. See *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995). The trial court gave the following instructions regarding defendant Gary McNamara's count of resisting an officer who was maintaining the peace in accordance with CJI2d 13.2:

> To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the defendant resisted or obstructed or opposed an officer of the law. The defendant must have actually resisted or obstructed or opposed by what he said or did, but physical violence is not necessary.
>
> Second, that the person the defendant resisted, opposed, or obstructed was an authorized person, to wit, the sheriff.
>
> Third, that the defendant knew then that the person was an officer of the law.
>
> Fourth, that the officer was then carrying out lawful duties.
>
> Fifth, that the defendant knew that the officer was doing so.
>
> Sixth, that the defendant intended to resist, obstruct or oppose the officer.
>
> Seventh, that the words or actions of the defendant in fact interfered with the officer in carrying out those duties.
>
> The fact that a process server may have violated the law in serving process is not a defense to the charge of resisting, opposing, or obstructing Sheriff Hilts.

Whether a defendant has engaged in conduct obstructing or resisting an officer should be decided on a case-by-case basis. *People v Philabaun*, 461 Mich 255, 263; 602 NW2d 371 (1999). Physical resistance, threats and abusive speech can be relevant facts in prosecuting a claim under MCL 750.479; MSA 28.747, but none of these acts are necessary elements of the crime. *Id.* at 262. An expressed threat of physical interference with an officer is sufficient to support a charge under the statute. *Id.* Likewise, abusive remarks to an officer, coupled with a refusal to comply with the officer's orders is sufficient to support a charge. *Id.* The purpose of MCL 750.479; MSA 28.747 is to protect police officers from physical violence and harm. *People v Baker*, 127 Mich App 297, 299-300; 338 NW2d 391 (1983). Here, we find no evidence that defendant Gary McNamara physically assaulted the officers from the sheriff's department; rather, the evidence indicates that he refused to move the backhoe as directed by the officers. Sheriff Hilts testified that defendant Gary McNamara appeared irritated and angry. Hilts also testified that Gary was acting irrationally, so Hilts told him to get off of the backhoe. Hilts further testified that there was "no way" he was going to let Gary "start that backhoe and have two tons of equipment chasing us down the highway." Under these facts, we find that defendant Gary McNamara's refusal to follow the sheriff's instructions regarding the operation of a backhoe endangered the officers and obstructed their efforts to resolve the confrontation between defendants and Wowianko in violation of MCL 750.479; MSA 28.747.

In their third sub-issue, defendants present another sufficiency question when they contend that the evidence does not support application of the statutory prohibition in MCL 750.479; MSA 28.747 for resisting, opposing or obstructing a process server to the conduct of either defendant. We disagree. Defendants point out that neither of them interfered with Wowianko's service of the papers on defendant Pam McNamara. While defendants did not prevent Pam from receiving the papers, we conclude that, at the very least, defendants obstructed Wowianko *after* the service of process in violation of the express statutory prohibition against such obstruction:

> [a]ny person who shall knowingly and wilfully obstruct, resist or oppose any . . . person duly authorized, in serving, or attempting to serve or execute any process . . . or who shall assault . . . any other officer duly authorized, while serving, or attempting to serve or execute any such process, rule or order, or for *having served, or attempted to serve or execute the same* . . . shall be guilty of a misdemeanor . . . [MCL 750.479; MSA 28.747.] [Emphasis added.]

Here, Wowianko testified that after he served defendant Pam McNamara with the papers, defendant Gary McNamara verbally threatened him, rocked his car and put him in fear of his safety. In addition, both defendants obstructed Wowianko's exit from the property. Viewing this evidence in the light most favorable to the prosecutor, we conclude that a rational trier of fact could find that defendants obstructed and assaulted Wowianko for having served process on defendant Pam McNamara.

In their fourth sub-issue, defendants contend that the resisting statute, MCL 750.479; MSA 28.747, is overly broad when considered in the context of the conduct in this case, rendering the interpretation of its prohibitions a violation of due process of law. Defendants did not raise this constitutional issue in the trial court. As a general rule, issues not raised before the trial court are not preserved for appeal. *Adams Outdoor Advertising v City of East Lansing*, 232 Mich App 587,

604; 591 NW2d 404 (1998), lv gtd 461 Mich 920 (1999). As an exception to this rule, this Court may address constitutional questions not raised below where no question of fact exists and the interests of justice and judicial economy so dictate. *Id.* However, we decline to address this constitutional question because neither the interests of justice nor judicial economy dictate the resolution of this issue.

In their final issue on appeal, defendants contend that they were denied ineffective assistance of counsel in violation of US Const, Am VI. Effective assistance of counsel is presumed, and it is the defendant's heavy burden to prove otherwise. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). To establish ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). The defendant must establish that his counsel's deficient representation prejudiced him to the extent of depriving him of a fair trial, must overcome the presumption that the challenged action was trial strategy, and establish "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Id.* at 6, quoting *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). In reviewing claims of ineffective assistance of counsel, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

While it does not appear that the trial court scheduled a formal *Ginther*[2] hearing, we note that the trial court considered the depositions of defense counsel and defendant Pam McNamara when it denied defendants' motion for a new trial. We are aided by the trial court's extensive fact finding set forth in its August 19, 1998 opinion denying defendants' amended motion for a new trial. The trial judge's resolution of these factual issues is entitled to deference on appeal. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983).

Defendants make seven claims of ineffective assistance of counsel. We conclude that all of their claims are without merit for the reasons set forth below. First, defendants contend that defense counsel failed to request crucial jury instructions on main defense theories and failed to otherwise present those theories to the jury. The jury instructions referred to here involve defendants' claim that they could rightfully detain Wowianko as a trespasser and that their criminal intent should be decided in light of their fear of a trespasser. As stated above, the trial court's instructions were proper. Defense counsel's failure to object to a proper jury instruction does not constitute ineffective assistance of counsel. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Second, defendants contend that defense counsel failed to object to the special prosecutor's reference to what Mr. Riley would have testified to with reference to his contact with defendant Pam McNamara. The special prosecutor's remarks regarding issues that Mr. Riley would have testified did not constitute prosecutorial misconduct. Furthermore, even in closing argument, the special prosecutor referred to Mr. Riley's comments as how to deal with a *trespasser*, not a *process server*. Defense counsel is not required to raise a meritless objection. *Torres*, *supra* at 425.

Third, defendants contend that defense counsel failed to investigate and present evidence concerning defendants' dispute with a land contract vendee. The special prosecutor presented evidence that defendants had a motive to obstruct Wowianko because they were expecting to be sued in their capacity as vendors in a land contract. Defendants contend that defense counsel was ineffective for failing to object to the special prosecutor's remarks on this issue during closing argument. Defense counsel testified at his deposition that he did not object to this issue as a matter of trial strategy and did not want to dignify the prosecution's arguments by reacting to them. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Rice (On Remand), supra* at 445.

Fourth, defendants contend that defense counsel improperly delegated witness interviews to defendant Pam McNamara and failed to object when the prosecution accused her of attempting to influence a witness' testimony. A defense counsel's failure to interview witnesses alone does not establish that counsel was ineffective. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). Even if defense counsel instructed defendant Pam McNamara to contact Kuhlman, defendants presented no evidence that counsel told her to try to influence Kuhlman's testimony. Defendants presented no authority to support their contention that defense counsel was ineffective for failing to object to the special prosecutor's questioning of Pam McNamara. A bald assertion without supporting authority precludes examination of the issue. *Impullitti v Impullitti*, 163 Mich App 507, 509; 415 NW2d 261 (1987).

Fifth, defendants contend that defense counsel's failure to call critical witnesses and to present independent medical evidence that defendant Pam McNamara suffered from a migraine headache on the date of the incident, amounted to ineffective assistance of counsel. The decision to call witnesses is a matter of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Whether counsel's failure to call supporting witnesses constitutes ineffective assistance of counsel is determined on a case-by-case basis. See, e.g., *Johnson, supra* at 124-125, in which the Court found that trial counsel's failure to call six supporting witnesses constituted ineffective assistance of counsel when the defendant's counsel "failed to offer testimony that meets even minimal standards of performance for his client or of his obligation as an officer of the court." *Id.* at 125. We agree with the trial court's determination that, as a matter of trial strategy, defense counsel chose not to call certain witnesses or to substantiate defendant Pam McNamara's claim that she suffered from a migraine headache on the date of the occurrence also constituted matters of trial strategy. Defendants presented numerous witnesses. Based upon this record, we cannot conclude that defendants' counsel failed to meet any minimal standard of performance.

Sixth, defendants contend that defense counsel failed to object to legal opinions offered by the process server and police officers relating to the legality of the process server's conduct on the date of the alleged offense. Defense counsel's decision not to object to statements by Wowianko and Schmidt that Wowianko was not trespassing on defendants' property was a matter of trial strategy. We agree with the trial court's conclusion that defendants incorrectly categorize Wowianko's testimony as a "legal opinion;" rather, his testimony was relevant because it allowed Wowianko to explain his presence on

the property, why he went into defendants' garage and why he would be entitled to proceed past a no-trespassing sign. Defense counsel is not required to raise a meritless objection. *Torres*, *supra* at 425.

Seventh, defendants contend that defense counsel failed to object to highly inflammatory and legally improper closing argument by the prosecution. The trial court sustained defense counsel's objections to certain comments by the prosecution. As noted above, those comments to which defense counsel failed to object could have been cured by proper instructions, and, in any event, did not result in a miscarriage of justice. Defense counsel is not required to raise a meritless objection. *Torres*, *supra* at 425.

Affirmed.

/s/ Michael R. Smolenski
/s/ Richard Allen Griffin
/s/ Janet T. Neff

[1] A special prosecutor, Mr. Mark A. Risk, was appointed after Mr. Riley, the Lake County prosecutor was disqualified to act in the case.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).